United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7414

United States Court of Appeals

FOR THE SECOND CIRCUIT

DIANA M. SCHUM,

Plaintiff-Appellant,

v.

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every member between I and XXXV, inclusive,

Defendants-Appellees.

On Appeal from the United States District Court, Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE, TERUO HIROSE

McALOON, FRIEDMAN, MANDELL, MALANG & CARROLL,
Attorneys for Defendant-Appellee, Teruo Hirose,
75 Maiden Lane,
New York, N. Y. 10038

NORMAN BARD,
Of Counsel.

STEVEN C. MANDELL,
On the Brief.

TABLE OF CONTENTS

Cases Cited

PAGE

Statute Cited

Rules Cited

United States Court of Appeals

FOR THE SECOND CIRCUIT

DIANA M. SCHUM,

Plaintiff-Appellant,

v.

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every member between I and XXXV, inclusive,

Defendants-Appellees.

On Appeal from the United States District Court, Southern District of New York

---

BRIEF FOR DEFENDANT-APPELLEE, TERUO HIROSE

Statement of the Issues Presented for Review

1. Is the rule of *Flanagan* v. *Mount Eden Hospital*, 24 N. Y. 2d 427 (i.e., discovery of foreign objects) applicable to the facts in this case?

2. Was the complaint properly dismissed by the court below?

The court below refused to extend the discovery rule in medical malpractice actions beyond that contained in *Flanagan*, and held that the instant medical malpractice action was time-barred.

Statement of the Case

A. Jurisdiction: By virtue of diversity of citizenship, jurisdiction is not disputed.

B. Procedural history: By order dated June 23, 1975, Judge Owen granted the defendants' motions for summary judgment and to dismiss this medical malpractice action on the ground that the action commenced in October, 1974 was barred by the New York Statute of Limitations.

C. Statement of facts: Reduced to its barest essentials, this four-count complaint alleges that the plaintiff underwent an unnecessary operation (Count 1) to which she did not give an informed consent (Count 2), resulting in an assault and trespass (Count 3) because of the fraud of the defendants (Count 4).

The plaintiff's five-page answering affidavit to the defendant Hirose's motion for summary judgment and dismissal of the complaint does not mention the defendant Hirose directly or indirectly. His connection with this case is set forth in the complaint. For the purpose of the motion in the court below, we concede the veracity of the facts therein contained (A 15).

The operative facts as gleaned from the first count are in substance as follows: That the defendant Hirose, a physician and surgeon duly licensed to practice medicine in the State of New York (¶3:A 2) was on September 18,

1967 engaged to perform services on the plaintiff, who was admitted to St. Barnabas Hospital for a diagnostic workup and clinical evaluation. Thereafter, on September 20th the plaintiff was discharged from the hospital, having been informed that all the tests were negative (¶8:A 3). Two weeks later the defendant Bailey called and informed the plaintiff that the original evaluation of the diagnostic tests was erroneous and that her condition actually disclosed a serious cardiac anomaly requiring immediate surgical repair (¶9:A 4). Relying upon this representation, the plaintiff alleges she was readmitted to St. Barnabas Hospital on October 20, 1967 for open heart surgery, which was performed by the defendant Bailey (¶10:A 5); that the defendants determined that the plaintiff was suffering from congenital heart disease; and that the defendants were negligent in the performance and evaluation of the aforesaid diagnostic tests (¶¶11 and 12). Plaintiff concludes by alleging that she underwent unnecessary surgery (¶13).

Exhibits B, C, D and E attached to the defendant Hirose's moving papers establish that the plaintiff was discharged from the hospital on November 19, 1967, the last possible contact between the plaintiff and the defendant Hirose. The plaintiff does not argue to the contrary.

Second, Third and Fourth Counts

Repeating the factual allegations set forth in the first count above, plaintiff in substance alleges in the second count that the operation that she underwent was performed without her informed consent (second count); and that the defendant was guilty of assault, battery and trespass (third count); and that the surgery was performed as a result of the fraud and false representations made to the plaintiff by the defendants that the plaintiff required surgical repair (fourth count).

POINT I

The causes of action set forth in the complaint are time-barred and were properly dismissed.

That the defendants have chartered the correct procedural course is clear. In *Sheets* v. *Burman*, 322 F. 2d 277, a malpractice action, in deciding defendant's motion for summary judgment based upon the Statute of Limitations, the Court stated (278):

> "In order for the court to issue a summary judgment under Rule 56, there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Stanley* v. *Guy Scroggins Construction Co.*, 5 Cir., 1961, 297 F. 2d 374; *Braniff* v. *Jackson Ave. Gretna Ferry, Inc.*, 5 Cir., 1960, 280 F. 2d 523. A claim barred by the applicable statute of limitations may be properly disposed of by summary judgment procedure. *Ayers* v. *Davidson*, 5 Cir., 1960, 285 F. 2d 137. If, however, there is a disputed factual issue as to whether the suit was timely brought the plaintiff must be allowed to present evidence on this point. *R. J. Reynolds Tobacco Co.* v. *Hudson*, 5 Cir., 1963, 314 F. 2d 776."

There, however, the Court held that there were factual issues in that case warranting a denial of the motion.

While the appellant has urged that there is a disputed issue of fact in this case, the appellant fails to set forth the nature of the fact or facts in dispute, nor can we glean from our review of the record any fact issue. For the purpose of this motion, we have conceded the truth and veracity of all of the plaintiff's allegations (A 15),

and we conclude (as did the court below, and as we urge this Court to do) that as a matter of law the New York Statute of Limitations bars the complaint.

The First Count is Time-Barred[1]

The Statute Involved

§214, Subd. 6 of the CPLR provides as follows:

> "The following actions must be commenced within three years:
>
> "6. An action to recover damages for malpractice."

Plaintiff's brief (p. 8) acknowledges as an undisputed fact that her complaint

> ". . . was not filed within three years of the commission of the tortious acts complained of."

The plaintiff asks this Court to graft upon New York law an exception to the Statute of Limitations in malpractice actions which the New York courts themselves have consistently refused to do.

In this case, this Court is not forced to decide questions of New York law on which the issue is less than immaculately clear (*Modave* v. *L. I. Jewish Hosp. Center*, 501 F. 2d 1065, 1067).

---

[1] The plaintiff's brief as we view it emphasizes and refers to the Court's action relative to the first and fourth counts only. No mention is made concerning the second and third counts, dealing with the doctrine of informed consent as well as assault and battery respectively, and we urge that they are all time-barred. In this brief, we deal with all the counts contained in the complaint.

The law in New York is immaculately clear that in malpractice actions the Statute of Limitations commences to run at the time of the commission of the wrongful act complained of.

Gilbert Properties v. *Millstein*, 33 N. Y. 2d 857, affirming on the opinion below, 40 A. D. 2d 100;
Sosnow v. *Paul*, 36 N. Y. 2d 782, affirming on the opinion below, 43 A. D. 2d 976;
Schwartz v. *Heyden Newport Chem. Co.*, 12 N. Y. 2d 212;
Borgia v. *City of N. Y.*, 12 N. Y. 2d 151;
Schiffman v. *Hospital for Joint Dis.*, 36 A. D. 2d 31, leave to appeal denied, 29 N. Y. 2d 483;
Dobbins v. *Clifford*, 39 A. D. 2d 1;
Randall v. *Weber*, 45 A. D. 2d 731;
Modave v. *L. I. Jewish Hosp. Center*, 501 F. 2d 1065.

However, the New York court has engrafted upon its general rule two exceptions which are commonly known as "the foreign object" exception (*Flanagan* v. *Mount Eden Hospital*, 20 N. Y. 2d 427), permitting the statute to run from the time of the discovery of the foreign object left in the plaintiff's body; and the "continuous treatment" exception as enumerated in *Borgia* v. *City of New York*, 12 N. Y. 2d 151.

The law was succinctly stated by the Court in *Dobbins* v. *Clifford*, supra (p. 2):

> "The general rule in malpractice actions is that the cause of action accrues on the date the alleged act of malpractice occurs, even though it may not be discovered until after the three-year Statute of

> Limitations has run (*Schwartz* v. *Heyden Newport Chem. Corp.*, 12 N. Y. 2d 212). There are two recognized exceptions to the general rule. One is the 'continuous treatment' exception (*Borgia* v. *City of New York*, 12 N. Y. 2d 151) and the other is the 'foreign object' exception (*Flanagan* v. *Mount Eden Gen. Hosp.*, 24 N. Y. 2d 427)."

The principal issue in this appeal is whether the foreign object exception applies to the case *sub judice*. No allegation has been made or proven that the continuing treatment exception is applicable here. The court below held that the foreign object exception does not apply. We urge this Court to affirm.

The "foreign object" exception was first enunciated by the Court of Appeals in *Flanagan* v. *Mt. Eden Hospital*, 24 N. Y. 2d 427. The discovery rule was then held applicable to a hip prosthesis which eventually disintegrated in *Murphy* v. *St. Charles Hospital*, 35 A. D. 2d 64; and where during the course of an operative procedure the plaintiff's pancreas was damaged in *Dobbins* v. *Clifford*, 39 A. D. 2d 1; and through radiation exposure from an allegedly defective radioactive isotope in *LeVine* v. *Isoserve*, 70 Misc. 2d 747.

The *Flanagan* rule, however, sets forth rather stringent criteria for its application, among which is the fact that the plaintiff's claim must not raise questions of credibility, nor may it rest on professional judgment or discretion; and that what happened to the plaintiff was not readily discoverable.

It is obvious that what happened to this plaintiff, i.e., the unnecessary surgery, was not anything which was hidden, but was open, obvious and patent. Moreover, as we view the complaint as well as the plaintiff's affidavit, we are dealing here wholly and solely with matters of pro-

fessional judgment which will necessarily raise issues of credibility. We submit that the criteria of *Flanagan* have not been met. The Court below correctly crystalized plaintiff's complaint when he stated (A 37):

> "Having carefully reviewed plaintiff's complaint herein as well as all of the affidavits and arguments submitted on this motion, it is clear that the plaintiff does not come within the exception permitted by *Dobbins*. In particular, it is clear from Paragraphs 9, 12 and 13 of the complaint that the thrust of plaintiff's cause of action is the professional diagnostic judgment of Drs. Bailey and Hirose, and their decision that the plaintiff required surgery for what they considered to be a serious cardiac anomaly."

The plaintiff has not met any of the criteria of *Flanagan*.

The courts in New York are most hesitant to extend the discovery rule (*Alexander & Belkin* v. *Peat, Marwick & Mitchell & Co.*, 385 F. Supp. 250). Each time the abandonment of the old rule and the adoption of the discovery rule was urged upon the Court of Appeals it was rejected, and as recently as April 1975.

> *Sosnow* v. *Paul*, 36 N. Y. 2d 782, affirming on the opinion below, 43 A. D. 2d 976;
> *Gilbert Properties* v. *Millstein*, 33 N. Y. 2d 857, affirming on the opinion below, 40 A. D. 2d 100.

In each of the cited cases, the Court of Appeals did not merely affirm without opinion. They specifically adopted the reasoning of the courts below which rejected the adoption of the discovery rule generally for New York malpractice cases.

The intermediate appellate courts have refused to depart from the general rule which has been set forth by

the New York Court of appeals. So, in *Gilbert Properties* v. *Millstein,* supra, the Court stated (40 A. D. 2d 104):

> "With due regard to the general holding of the decisions cited in the preceding paragraph and although the Legislature has repeatedly rejected proposals to fix a limitation period in malpractice causes based on the time of discovery (see legislative history as set forth by BREITEL, J., in dissenting opn. *Flanagan* v. *Mt. Eden Gen. Hosp.*, 24 N. Y. 2d 427, 439), the courts in this State have applied a time of discovery rule in those medical malpractice cases involving 'foreign objects' in a plaintiff's body and in cases of internal injury malpractice where discovery is difficult (see *Flanagan* v. *Mt. Eden Gen. Hosp.*, supra; *Murphy* v. *St. Charles Hosp.*, 35 A. D. 2d 64; *Dobbins* v. *Clifford,* supra). *But it is held that it is doubtful whether the role of the Appellate Division as an intermediate appellate court would allow it 'to depart further from the traditional view of the Statute of Limitations than Flanagan sanctions; a question of public policy in the interpretation of the statute and the balance between the Legislature and the courts in changing a rule of law is plainly raised,* which the close division in the votes of the members of the court in *Flanagan* demonstrates' (*Schiffman* v. *Hospital for Joint Diseases,* 36 A.D.2d 31, 33, supra)."

Because *Schiffman* v. *Hospital for Joint Diseases,* 36 A. D. 2d 31 so clearly crystalizes the law in New York, we discuss this case at some length. There, the Court stated (32):

> "This action was commenced on June 10, 1969 and the defendant hospital moved to dismiss the complaint, without serving an answer, on the ground

that the action was untimely brought (CPLR 3211, subd. [a], par. 5). An action to recover damages for malpractice must be instituted within three years from the time the cause of action accrued (CPLR 203, subd. [a]; 214 subd. 6). Hence, the point for determination is whether the plaintiff's cause of action accrued in 1959, the time of the misreading of the biopsy slides, or in 1967, the time of the discovery of the error and the plaintiff's first knowledge of it."

The Court set forth the plaintiff's argument as follows:

"The plaintiff's argument that the action accrued in 1967 hangs on *Flanagan* v. *Mount Eden Gen. Hosp.* (24 N. Y. 2d 427). That case, he says, recognized the inherent difficulty faced by a patient who is a victim of malpractice to know that he has been negligently treated, and that, where the proof of the malpractice is clear and retains its identity, the patient's action for damages accrues when the malpractice is discovered or could have been reasonably discovered in the exercise of diligence. (32)

* * *

"The plaintiff's dependence on *Flanagan* necessarily implies that the rule measuring the statute from the date of the event of the negligence has been abandoned in all cases of malpractice, regardless of its character."

Concerning the *Flanagan* holding, the Court continued (33):

"We do not think *Flanagan* can be read so broadly. Indeed, the majority opinion carefully limited the issue which was presented: 'When should the Statute of Limitations begin to run in a foreign object

> medical malpractice case?' (*Flanagan* v. *Mount Eden Gen. Hosp.*, supra, p. 429). Moreover, in speaking of the plaintiff's claim that surgical clamps used in an operation were not removed from her body, Judge KEATING said that it did not 'rest on professional diagnostic judgment or discretion', but 'solely on the presence of a foreign object within her abdomen' (p. 431). Finally, the modification of the general rule was clearly phrased to apply to an action based on the negligent failure to remove a foreign object (p. 431)."

Mindful of the fact that it was an intermediate appellate court, the Court stated (33):

> "We read this determination apart from our role as an intermediate appellate court which must take its guidelines from the court of last resort. It is extremely doubtful whether that role would allow us to depart further from the traditional view of the Statute of Limitations than *Flanagan* sanctions; a question of public policy in the interpretation of the statute and the balance between the Legislature and the courts in changing a rule of law is plainly raised, which the close division in the votes of the members of the court in *Flanagan* demonstrates."

The Court concluded (35):

> "In affirming the dismissal of the complaint by the Special Term, we are aware that the California courts have reached a conclusion favorable to the plaintiff's arguments (*Thompson* v. *County of Fresno*, 59 Cal. 2d 686; *Custodio* v. *Bauer*, 251 Cal. App. 2d 303; *Calvin* v. *Thayer*, 150 Cal. App. 2d 610). We are aware, too, that commentators have

> expressed the belief that the cause of action for all cases of malpractice should begin to run from the time when the practice should begin to run from the time when the patient actually discovered, or with due diligence should have discovered, the negligent act (note, 29 U. Pitt. L. Rev. 341; comment, 21 Rutgers L. Rev. 778). For the reasons stated, we cannot agree."

To this list of commentators who have opted for the discovery rule, we add Prof. McLaughlin, who was cited by the appellant in his brief (p. 13). As we will later demonstrate the Legislature of the State of New York has taken a much more restrictive view.

In *Sosnow* v. *Paul*, supra, the Appellate Division stated (43 A. D. 2d 978 aff. 36 N. Y. 2d 782):

> "The *Flanagan* case permits an exception to the cited rule only in medical malpractice cases where the malfeasance charge is leaving a foreign object in the patient's body. In *Schiffman* v. *Hospital for Joint Diseases* (36 A. D. 2d 31) we made it clear that it was the opinion of this court that *Flanagan* should be limited to such cases."

Then, in *Randall* v. *Weber*, 45 A. D. 2d 731, when the discovery rule was again sought to be incorporated into New York law, the Appellate Division stated:

> "We adhere to our decision in *Schiffman* v. *Hospital for Joint Diseases* (36 A. D. 2d 31, mot. for lv. to app. den. 29 N. Y. 2d 483) with respect to the nonapplicability of the 'foreign objects—discovery rule' to cases of negligent diagnosis or treatment."

In essence, the appellate divisions have told the bar that we have had enough attacks on the rule. We are

not going to change or expand it. The Court of Appeals' affirmances on the opinions of the Appellate Divisions apparently adopts this view.

Not only have the courts set forth our public policy, but the New York Legislature has spoken as well. As a result of the multiple complaints on the part of the medical profession during the so-called "medical malpractice insurance crisis" in the early part of this year, the Legislature of the State of New York passed Chapter 109 of the Laws of 1975. This chapter deals in part with one of the problems which was of major concern to the medical profession, i.e., the Statute of Limitations. As a result, §214, Subd. 6 was modified by eliminating medical malpractice actions from the 3-year limit; and §214(a) was added, reducing the medical malpractice Statute of Limitations from three to two and one-half years. But most significantly, the Legislature dealt a blow to those adherents of the discovery rule and sharply limited the foreign object rule. The statute reads as follows:

> "§214-a. Action for medical malpractice to be commenced within two years and six months; exceptions
>
> "An action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; *provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.* For the purpose of this section the term 'continuous treatment'

> shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. *For the purpose of this section the term 'foreign object' shall not include a chemical compound, fixation device or prosthetic aid or device.*"

As we read the statute, the Legislature has overturned *Dobbins* v. *Clifford*, supra, *Murphy* v. *St. Charles Hospital*, supra and *LeVine* v. *Isoserve*, supra. They in effect have said that *Flanagan* v. *Mt. Eden Hospital* is as far as we will go.

The policy of New York on this point from both the judicial and legislative points of view is clear—the discovery doctrine is not now to be extended beyond the holding in the *Flanagan* case.

The fact that the plaintiff may have been ignorant that a cause of action existed in her favor does not in itself lengthen the Statute of Limitations where the facts were available to her. Surely, the facts in this case were available to her long before the action was commenced. They were open, obvious and patent.

> *Schiffman* v. *Hosp. for Joint Dis.*, 36 A. D. 2d 31;
> *509 Sixth Ave. Corp.* v. *NYCTA*, 15 N. Y. 2d 48, 51;
> *Schmidt* v. *Merchants Desp. Transp. Co.*, 270 N. Y. 287
> *Varga* v. *Credit Suisse*, 5 A. D. 2d 289, aff'd, 5 N. Y. 2d 865;
> *Libby* v. *VanDerzee*, 30 App. Div. 494, aff'd. 176 N. Y. 591.

We respectfully submit, therefore, that this Court should not engraft any discovery rule under the facts and circumstances of this case. There are no unusual or ex-

tenuating circumstances to warrant the extension. The criteria set forth in *Flanagan* are not met here. We believe that the court below correctly held that the first cause of action which sounds in malpractice is governed by the three-year statute as set forth in the CPLR, §215(6). Since the last date upon which the defendant Hirose could have seen the plaintiff was in November of 1967, the first count was time-barred.

(a)

The second and third causes of action dealing with informed consent and assault and battery are time-barred.

The Statutes Involved

CPLR 215 subd. 3 provides:

> "The following actions shall be commenced within one year:
>
> * * *
>
> "3. An action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law."

CPLR 214 subd. 6 provides:

> "The following actions must be commenced within three years:
>
> * * *
>
> "6. An action to recover damages for malpractice."

We have set forth both statutes which could conceivably be applicable to these counts. The reason for this is because there is a sharp conflict in New York law as to whether or not the cause of action for informed consent is based upon assault or upon malpractice. Of course, if it were based upon assault then the one-year statute (CPLR 215 subd. 3) would apply; but if based upon malpractice then the three-year statute would apply (compare *Pearl* v. *Lesnick*, 20 A. D. 2d 761, aff'd. 19 N. Y. 2d 590 and *Cox* v. *Stratton*, 77 Misc. 2d 156 with *Bruse* v. *Brickner*, 78 Misc. 2d 999 and *Terry* v. *Albany Medical Center*, 78 Misc. 2d 1035). See also Chapter 109, 1975 Laws of New York.

We need not at this point express our view as to which is the better or more sound rule. Irrespective of which Statute of Limitations is applicable, more than three years have elapsed. Concerning the second cause of action, the Court below correctly observed:

> "Whichever statute governs, it makes little difference since the three years have passed in any event." (A34)

Concerning the third count, the Court again observed in almost identical language (A35):

> "Again, whichever Statute of Limitations applies, either one year under CPLR 215(3) or three years under CPLR 214(6), the action is still time-barred especially in view of the fact that the continuous treatment doctrine would not here be applicable."

(b)

The Fourth Count is Time-Barred

In the fourth cause of action, in an attempt to circumvent the three-year Statute of Limitations, the plaintiff alleges fraud with a view toward bringing the count within the purview of the six-year Statute.

The New York courts have consistently held, as the Court below recognized and determined, that in malpractice actions even though fraud is alleged the three-year Statute applies, and not the six-year fraud Statute.

Gautieri v. *New Rochelle Hosp.*, 4 A. D. 2d 874, aff'd. 5 N. Y. 2d 952;
Golia v. *Health Ins. Plan of N. Y.*, 6 A. D. 2d 884.

In *Gautieri* v. *New Rochelle Hospital*, supra, the defendant apealed from an order denying its motion to dismiss the malpractice action against it on the ground that the action was time-barred. In reversing the denial and dismissing the complaint, the Court stated (p. 874):

> It is immaterial whether the action be regarded as *ex contractu* or *ex delicto*. Since appellant's common-law duty and its implied contractual obligation were one and the same, "the suit, however labeled, is one in negligence, at least for time limitation purposes" (*Blessington* v. *McCrory Stores Corp.*, 305 N. Y. 140, 148; *Webber* v. *Herkimer & Mohawk St. R. R. Co.*, 109 N. Y. 311; *Hermes* v. *Westchester Racing Assn.*, 213 App. Div. 147; *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, affd. 287 N. Y. 670). Accordingly, the three-year period of limitation (Civ. Prac. Act, § 49, subd. 6) applies.

Golia v. *Health Insurance Plan of N. Y.*, supra, was a malpractice action. In dismissing the second and third causes of action the Court stated (875):

> As to second and third causes of action, which purport to declare in contract and in fraud and deceit, respectively, it is our opinion that, however labeled, they are neverthless, as is the first cause of action, to recover damages for malpractice, at least for time limitation purposes (cf. *Frankel* v. *Wolper,* 181 App. Div. 485, affd. 228 N. Y. 582; *Gautieri* v. *New Rochelle Hosp. Assn.,* 4 A D 2d 874; *Budoff* v. *Kessler,* 284 App. Div. 1049, *supra; Calabrese* v. *Bickley,* 208 Misc. 407; *Tulloch* v. *Haselo,* 218 App. Div. 313; *Ranalli* v. *Breed,* 251 App. Div. 750 supra).

Accordingly, we respectfully submit that the court below correctly held the fourth count as time-barred.

We therefore respectfully submit, and it is our

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

McAloon, Friedman, Mandell,
Malang & Carroll,
Attorneys for Defendant-Appellee,
Teruo Hirose.

Norman Bard,
Of Counsel.

Steven C. Mandell,
On the Brief.